per centum per month from the time such tax was due until paid. If payment be not made within ten days after demand therefor by the commissioner, there may be added twenty five per cent for the first offense and fifty per cent for subsequent offenses as damages together with interest at the rate of one per centum per month on the tax from the time such tax was due. Provided, however, in the event such taxpayer, with ten days from the date of such notice, shall by petition in writing state that said return is incorrect, the commissioner shall grant a hearing on such petition and investigate that question fully before proceeding further under this section."

Section 12, provides, in substance, that the commissioner or his authorized agents, may examine any books, papers, record, or other data bearing upon the correctness of any return, or for the purpose of making a return where none has been made, as required, including the records of any common carrier, bank, wholesale or retail dealer in any kind of merchandise, doing business in the state of Mississippi, whether in regard to his own or another's return, and authorizes the commissioner to require the attendance of any person and take his testimony with respect to any such matter, with power to administer oaths to such person or persons.

Section 1, Chapter 150, Laws of 1938, reads as follows:

"Section 1. Be it enacted by the Legislature of the State of Mississippi, That section 2 of chapter 119, Laws of 1932, be amended to read as follows:

"The governor shall designate the other associate commissioner as 'excise commissioner', who shall be selected from the state at large, and who shall preferably, though not necessarily, be an attorney at law.

"It shall be the duty of the excise commissioner to familiarize himself with the laws imposing income, sales and

other taxes administered by the chairman of the commission. He shall have charge of all appeals from decisions of the chairman to the entire commission, shall arrange the time and place of hearing such appeals, and shall provide for the preparation and presentation to the commission of all evidence, documents, and other matters necessary and proper for a decision on the matters and questions involved in the appeal. The excise commissioner shall, when necessary, direct and supervise the preparation of any record to be filed in any court of the state. When directed by the other members of the commission, and agreed to by the appealing taxpayers, he may hold a hearing on any appeal from a decision of the chairman at the time and place agreed to, and at such hearing shall take the testimony of witnesses, verbally, or in writing, take depositions, and shall have the power to require the production of books and other records and papers which the chairman is authorized to demand or examine, and he shall have authority to make copies of same. At the conclusion of the hearing, the excise commissioner shall submit all written evidence, documents, records and other pertinent information to the other members of the commission, together with a report in writing setting forth a review of the cause and the essential facts of the matter. Whereupon the whole commission, if the appealing taxpayer assents thereto, shall render its decision on the appeal; but if the taxpayer desires a further hearing on the cause, the whole commission shall hear the appeal at its office in the capitol. * * *"

B.

Date of the Judgment and Application for Appeal.

The date of the judgment sought to be reviewed is January 12, 1942. A suggestion of error was filed by appellant, and said suggestion of error was overruled by the Supreme

Court of Mississippi, on February 9, 1942. Petition of appellant for allowance of appeal to the Supreme Court of the United States, accompanied by assignment of errors and prayer for reversal, was presented to the Chief Justice of the Supreme Court of Mississippi, in his office in the City of Jackson, Mississippi, on Monday, March 9th, 1942, and the appeal was allowed.

C.

Nature of Case and Rulings Below.

This is a proceeding to collect additional sales tax from appellant for the years 1937 and 1938, pursuant to the authority of Section 6, Chapter 113, Laws of 1938. Following receipt of the registered notice, required to be mailed the taxpayer, by said Section 6, appellant filed his written petition and prayed for the hearing provided by the statute, asking appellees to investigate the matter fully before proceeding further under the section. Appellant raised the question of jurisdiction of appellees to make the additional assessment, without first showing he had failed to preserve invoices for a period of two years, or maintain adequate records. He moved to quash the assessments, else that they be abated until the statutory duties enjoined on appellees were fully discharged. The hearing was granted, but appellees refused to investigate the matter fully, and said they would not investigate it fully or at all. No record was made of the testimony of appellant and the witnesses introduced by him, which testimony showed the additional assessments were not made from the best information available, as required by the act, but by comparison, appellees comparing the business of appellant for the years 1937 and 1938, because of which the additional assessments are made, with the business of other merchants in Gulfport, Mississippi, in the year 1939, and which testimony further showed that appellees made the assessments

against appellant purposely high to take care of whatever they might be able to find. Such testimony was not contradicted and not denied; in fact it was not even disputed. No evidence was introduced by appellees, no books, records or other papers, and no depositions were taken, and nothing whatever was introduced in evidence. At the conclusion of the hearing, before the excise commissioner, as provided by Section 1, Chapter 150, Laws of 1938, such Excise Commissioner failed and refused to submit written evidence, documents, records and other pertinent information to the other members of the Commission, together with a report in writing setting forth a review of the cause and the essential facts of the matter. There was nothing done that remotely resembles a hearing, and certainly the duty enjoined on appellees by the statute to investigate the matter fully, to subpoena witnesses, examine books, records and other data, and at the conclusion of the hearing, to submit all written evidence, documents, records and other pertinent information to the other members of the commission, together with a report in writing setting forth a review of the cause, and the essential facts of the matter, was not performed. It is contended by appellant here that the statutes referred to, as construed and applied by appellees and the Supreme Court of the State of Mississippi, in this cause, deprive appellant of due process of law, and violate the Fourteenth Amendment to the Constitution of the United States.

The matters involved are substantial in that the statutes, as construed and applied by appellees, in which they were upheld by the Supreme Court of Mississippi, deprive appellant of that due process which the legislature intended, and which it was the intention of the Fourteenth Amendment to guard against impairment by state action. Said statutes were so construed and applied, that appellees were permitted to proceed against appellant without subpoenaes

for witnesses, without the documents, evidence and depositions provided by the statutes, without being required to inform appellant of the state of case he was required to meet and defend, without a record of the proceedings, and without a finding of fact, setting forth a review of the cause and the essential facts of the matter, contrary to the express provisions of Sections 6 and 12, Chapter 113, Laws of 1938, and Section 1, Chapter 150, Laws of 1938, and thus said statutes, as construed and applied, deprive appellant of due process of law, guaranteed by the Fourteenth Amendment to the Constitution of the United States. The questions involved are, therefore, substantial. Without compliance with the statutes, as enacted by the legislature, appellees in this cause were permitted to make the additional assessments against appellant. Appellant was deprived of the opportunity to know the state of the case against him, given no opportunity to defend himself, and the action of appellees was, hence, arbitrary and capricious. To permit appellees to collect the amount of the said additional assessments, will take the property of appellant without due process of law.

From the time of filing his petition, following receipt of the registered notice of the additional assessments for sales tax, appellant attacked the constitutionality of Section 6, Chapter 113, Laws of 1938, Section 12, Chapter 113, Laws of 1938, and Section 1, Chapter 150, Laws of 1938, of Mississippi, as construed and applied by appellees, in proceeding against him arbitrarily and without due process. The questions involved in this cause are substantial, the Federal question being whether the action of appellees deprive appellant of due process of law, guaranteed by the Fourteenth Amendment to the Constitution of the United States. The statutes themselves, if properly construed and applied, may be constitutional, except as to the delegation of legislative power, later to be covered in this Amended

Statement of Jurisdiction, providing for Notice by Registered Mail, hearings, introduction of evidence, documents and records and other data, summoning witnesses, making a report in writing setting forth a review of the cause and the essential facts of the matter. Here the procedure was not as provided by the statutes. Appellees so construed the statutes that they were not required to afford appellant an adequate hearing, refused him subpoenas, a record of the cause, refused to investigate the matter fully, or at all, a report in writing setting forth a review of the cause and the essential facts of the matter. They construed the statutes as not requiring them to introduce evidence. Appellant contends he was not afforded a hearing within the meaning of the statutes, that no fair and adequate hearing was held by appellees, and the assessments are void on their face for want of evidence to support them, and a finding of fact by appellees upon which the court can pass judgment, or know what was before the State Tax Commission of Mississippi, and upon what the additional assessments against appellant were, and are, founded, beyond the naked charge that appellant owes additional sales tax to the State Tax Commission of Mississippi.

The Federal question presented by the record of this cause was raised by pleas in abatement, R. 20,[1] Motions to quash, R. 20, Special bill of exceptions, R. 20, Objections Nos. 1 to 10, inclusive, and Objections Nos. 1 to 18, inclusive, R. 20, Motion for Bill of Particulars, R. 20, Interrogatories, R. 20.

Appellant's motion for Bill of Particulars was overruled by appellees, and his interrogatories were refused.

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[1] All references to the record are to the pages of the certified transcript of the unprinted record prepared by the Clerk of the Supreme Court of Mississippi, and on file with the Clerk of this Court. The record has not yet been printed.

The Objections to the Order of May 24, 1940, appear at R. 25 through R. 30.

The Objections to the Order of January 12, 1940, appear at R. 45 through R. 48.

The Special Bill of exceptions requested by appellant, and refused by appellees, appears at R. 31 through R. 36.

Plea in Abatement appears at R. 62.

Amended Plea in abatement appears at R. 57.

Motion to quash assessment appears at R. 70.

Amended motion to quash assessment appears at R. 65.

Interrogatories propounded by appellant appear at R. 84.

Motion for Bill of Particulars appears at R. 86.

The Federal question involved in this cause was further presented by Petition for writ of certiorari, filed in the Circuit Court of Hinds County, Mississippi, R. 4-18. The Federal question was again presented in the Supreme Court of Mississippi, by Assignment of Errors, R. 168-171, and by Suggestion of Error, R. 172-178.

Appellant appends to this statement of jurisdiction copy of the opinion of the Supreme Court of Mississippi, affirming the Circuit Court of Hinds County, Mississippi, rendered January 12, 1942. Appellant also appends to this Statement of Jurisdiction copy of Per Curiam request of the Supreme Court of Mississippi for additional brief on the Federal question involved in this cause.

Appellees ignored the Federal question. The Circuit Court of Hinds County, Mississippi, pretermitted decision of the Federal question, but delivered no written opinion. The Supreme Court of Mississippi, as shown by copy of the opinion of the Court appended to the original Statement of Jurisdiction filed herein, disposed of the question by holding that "The assessment here made by the Chairman of the State Tax Commission sufficiently complies with these requirements, it became thereby prima facie correct, and the taxpayer was given an opportunity both by the Chairman

of the Commission and by the Tax Commission itself to negative by evidence the facts on which the assessment was based. The Order of the State Tax Commission being simply one approving the assessment made by its Chairman, it was not necessary for it to again set forth the facts on which the assessment was made."

As shown by the record of this cause, the assessments have no foundation in fact. The Court supposes what does not exist. Nothing was introduced or shown by appellees. No report in writing was made setting forth a review of the cause and the essential facts of the matter, required by Section 1, Chapter 150, Laws of 1938, because such essential facts do not exist.

The Supreme Court of Mississippi disposed of the contention of appellant, that Orders of Quasi-judicial commissions and bodies must be supported by a finding of basic facts; otherwise they are unconstitutional, null and void, and violate the Due Process Clause of the Constitution of the United States, and Sec. 14 of the Constitution of Mississippi, by holding as quoted above.

The other contentions of appellant, that appellees proceeded against him arbitrarily, and denied him due process of law, guaranteed by the Fourteenth Amendment to the Constitution of the United States, were ignored by the Supreme Court of Mississippi, as shown by the opinion of the Court.

Cases sustaining the jurisdiction of the Supreme Court of the United States to review this cause, relied upon by appellant, are the following, in brief:

American Sugar Refining Co. v. *State of Louisiana*, 21 S. Ct. 43, 179 U. S. 89, 45 L. Ed. 102;

Southern P. Co. v. *Schuyler*, 227 U. S. 601, 611, 57 L. Ed. 662, 669, 33 S. Ct. 277;

Norfolk, etc. R. Co. v. *Conley*, 236 U. S. 605, 35 S. Ct. 437, 59 L. Ed. 745;

Kansas City Southern R. Co. v. *H. Albers Commission Co.*, 223 U. S. 573, 591, 593, 56 L. Ed. 556, 565, 566, 32 S. Ct. 316;

Merchants' Nat. Bank v. *Richmond*, 256 U. S. 635, 41 S. Ct. 619, 65 L. Ed. 1135;

Fiske v. *State of Kansas*, 274 U. S. 380, 71 L. Ed. 1108, 47 S. Ct. 655;

Northern Pac. Ry. Co. v. *Department of Public Works of Washington*, 268 U. S. 39, 69 L. Ed. 836, 45 S. Ct. 412;

Southern Ry. Co. v. *Virginia*, 290 U. S. 190;

Londoner v. *Denver*, 210 U. S. 373;

Fallbrook Irrigation District v. *Bradley*, 164 U. S. 112, 171;

Wichita R. & Light Co. v. *Public Utilities Commission of Kansas*, 260 U. S. 48;

Mahler v. *Eby*, 264 U. S. 32;

Greene v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508;

Bi-Metallic Co. v. *Colorado*, 239 U. S. 441;

Ohio Bell Tel. Co. v. *Public Utilities Commission of Ohio*, 301 U. S. 292;

Pacific States Box & Basket Co. v. *White*, 296 U. S. 176;

Chicago, Milwaukee & St. Paul Ry. Co. v. *Minnesota*, 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462;

Ohio Valley Water Co. v. *Ben Avon Borough*, 253 U. S. 287, 64 L. Ed. 908, 40 S. Ct. 527.

It is further the contention of appellant that Section 6, Chapter 113 of the Laws of Mississippi of 1938, is unconstitutional, null and void and violative of the due process clause of the Federal and State Constitutions and the equal protection clause of the Constitution of the United States, in that it permits the Chairman of the State Tax Commission to proceed without benefit of compulsory process for the

production of witnesses, books, records and other matter necessary to the proper determination of additional sales tax, and said Act is unconstitutional and violates the Fourteenth Amendment of the Constitution of the United States as to the rights of appellant in that it permits the additional sales tax assessment attempted to be enforced against appellant without the benefit of written evidence, without requiring his interrogatories to be answered and a bill of particulars to be furnished; and, further Section 6, Chapter 113, Laws of 1938, permitting appellees to make additional returns and assessments from the "best information available" without defining and limiting the power and right of the appellees, vests legislative discretion with appellees, and is an attempt to delegate legislative prerogatives to appellees, and said section, and particularly said provision, is unconstitutional, null and void.

The inferior administrative tribunal ignored and overruled appellant's pleas in abatement and motions to quash, raising all of these questions, which are substantial, and the appellate court ignored the contention of appellant, and, as shown by the opinion of said court, pretermitted a decision on said matters. The questions presented here were brought to the attention of the Supreme Court of Mississippi through petition for writ of certiorari (R. 4-13) and by assignment of errors (R. 168-171) filed in said court and printed briefs on behalf of appellant in Cause No. 34,664 on the docket of said Supreme Court. The decisions of this Court relied upon by appellant to sustain his contention that this Court has jurisdiction to review his attack upon the provision of Section 6 of Chapter 113 of the Laws of 1938 of Mississippi, permitting appellees to make additional sales tax assessments from the "best information available" are the following:

Wilson v. *Eureka City,* 173 U. S. 32;

Green v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508;

Chicago Great Western Ry. Co. v. *Kendall*, 266 U. S. 94, 97-98.

Appellant submits that the question above presented is substantial in that appellees, under the statute, are permitted to make additional assessments against appellant without rule, norm, or formula, and the statute does not define the meaning of "best information available", and what might be the best information available in one case would be materially different in another, and thus several yardsticks for measuring additional sales taxes would be available to appellees. Appellant raised the question in the lower court and again in the Supreme Court of Mississippi, through his petition for writ of certiorari, shown at pages 10 and 11 of the record, and again at R. 13-17.

Appellant submits that the questions presented, showing jurisdiction of this Court to review the judgment of the Supreme Court of Mississippi on appeal are substantial; they present a Federal question. The Supreme Court of Mississippi has not passed upon the contention of appellant, in this or other cases, and the decision of the Supreme Court of Mississippi in the case appealed to the Supreme Court of the United States is contrary to the decisions of the Supreme Court of the United States, and because of the Federal questions involved this Court has jurisdiction to decide and is free to pass upon all controverted issues whether or not they involve Federal questions, and the permissibility of delegation of power may thus be deliberated and, in the absence of controlling State decisions, will be determined as an original proposition. The case relied upon by appellant to sustain the jurisdiction of this Court upon this last proposition is:

Yick Wo v. *Hopkins*, 118 U. S. 356.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of Section 237 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Respectfully submitted,

ALBERT SIDNEY JOHNSTON, JR.,
Counsel for Appellant.